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No. 87-2066

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In the Supreme Court of the United States

OCTOBER TERM, 1988

W.S. KIRKPATRICK & CO., INC., ET AL., PETITIONERS

v.

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
JOHN P. SCHNITKER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

29pp

QUESTIONS PRESENTED

1. Whether the act of state doctrine bars judicial inquiry into whether the award by the Nigerian Government of a military construction contract was caused by the payment of bribes to Nigerian officials.

2. Whether plaintiff alleged a "pattern of racketeering activity" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968 (1982 & Supp. V 1987).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Respondent, a Pennsylvania corporation, is the disappointed bidder on a construction contract awarded by the Federal Republic of Nigeria. A subsidiary of petitioner W.S. Kirkpatrick, Inc., a New Jersey corporation, was the successful bidder. Respondent alleges that Kirkpatrick obtained the contract by bribing officials of the Nigerian Government. Respondent seeks to recover damages from Kirkpatrick and the other petitioners under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968 (1982 & Supp. V 1987); Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13 (c); and the New Jersey Anti-Racketeering Act, N.J. Stat. Ann. §§ 41-1 to 41-6.2 (West 1982).

1. In 1980, defendant Harry Carpenter, Kirkpatrick's Chairman and Chief Executive Officer, learned that the Nigerian Government was interested in constructing and

equipping an aeromedical center for the Nigerian Air Force.[1] Carpenter hired a Nigerian national, defendant Benson "Tunde" Akindele, to act as Kirkpatrick's local agent in procuring the contract. According to a March 1981 memorandum, Akindele informed Carpenter that Kirkpatrick should be prepared to pay a "sales commission" totalling 20% of the contract price to Nigerian political and military officials. Akindele stated that Nigerian officials generally expected such payments from bidders and that American companies often lost Nigerian defense contracts to their European competitors because they failed to make such arrangements.[2] Ultimately, Kirkpatrick and Akindele entered into a written agreement providing that, upon successful award of the contract, Kirkpatrick would pay a commission to two Panamanian corporations established by Akindele to receive and distribute the commission to the relevant Nigerian officials. Eventually, both respondent and Kirkpatrick submitted bids, and the contract was awarded to a subsidiary of Kirkpatrick on March 19, 1982. On four occasions in 1982 and 1983, the Nigerian Government made payments under the contract to Kirkpatrick. On each occasion, Kirkpatrick paid the promised "commission" to Akindele's Panamanian corporations, which then distributed the monies. Kirkpatrick paid more than $1.7 million in "commissions" under this arrangement. Pet. App. A4-A6, A42-A43.

In April 1983, respondent learned that its bid had been far lower than Kirkpatrick's. After investigating the matter, respondent reported its findings to the Nigerian Air Force and the United States Embassy in Lagos. Ul-

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[1] The statement of facts in the text is taken from the opinions below, which are based on the allegations in the complaint. See Pet. App. A4 n.1.

[2] As alleged in respondent's amended complaint, the 20% commission was to be distributed as follows: 2½% to Akindele, 5% for the Nigerian Air Force, 2½% for the medical group, 5% for a political party, 2½% for the relevant cabinet minister, and 2½% for other key defense personnel. Pet. App. A5 n.3.

timately, Carpenter and Kirkpatrick pleaded guilty to one count of violating the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. 78dd-2. In connection with their pleas, Carpenter and Kirkpatrick stipulated to an offer of proof that outlined the agreement between Carpenter and Akindele and the payments to the Panamanian corporations, but did not state that money had actually been paid to Nigerian officials. Carpenter was sentenced to 200 hours of community service and fined $10,000; Kirkpatrick was fined $75,000, payable over a five-year period. Pet. App. A6-A7, A43-A44.[3]

2. a. Respondent then brought this suit seeking to recover damages from Kirkpatrick and the other petitioners for its loss of the contract. Petitioners moved to dismiss the complaint on the ground, *inter alia*, that the suit is barred by the act of state doctrine. Before ruling on that defense, the district court requested the views of the Department of State. The Legal Adviser responded by letter dated December 10, 1986. He informed the court that the United States had taken the position in its amicus briefs in *Mitsui & Co.* v. *Industrial Investment Development Corp.*, 445 U.S. 903 (1980), and *Hunt* v. *Mobil Oil Corp.*, 434 U.S. 984 (1977), that inquiries into the motivation (as distinguished from the validity) of the official acts of a foreign sovereign are not barred by the act of state doctrine (Pet. App. A34-A37). Quoting those briefs, he explained (*id.* at A35 (emphasis in letter)):

> "[W]hile judicial examination of purpose may on occasion implicate some of the concerns underlying the act of state doctrine, that doctrine only precludes judicial questioning of the *validity* or *legality* of foreign government actions . . . .
>
> None of this Court's decisions suggests that the act of state doctrine precludes all judicial inquiries that

[3] At Kirkpatrick's sentencing, the Assistant United States Attorney informed the court that the State Department was concerned about the possible impact on the Nigerian Government if the grand jury disclosed information about who might have received the payments, since some officials named were prominent military figures who were still in power (Pet. App. A43-A44).

> may embarrass a foreign state or affect the political branches' conduct of foreign relations. Rather, the act of state doctrine is based on the need to avoid unprincipled decisions resulting from the absence of legal standards, and the unique embarrassment, and the particular interference with the conduct of foreign affairs, that may result from the judicial determination that a foreign sovereign's acts are invalid. Judicial inquiry into the purpose of a foreign sovereign's acts would not require a court to rule on the legality of those acts, and a finding concerning purpose would not entail the particular kind of harm that the act of state doctrine is designed to avoid. Dismissal of a complaint before the development of evidence, merely because adjudication raises the bare possibility of embarrassment, constitutes an unwarranted expansion of the act of state doctrine and is contrary to the flexibility with which that doctrine should be applied."

Adhering to this view, and based on his understanding that "the validity of the Nigerian Government's decision to award the contract * * * is not in question," the Legal Adviser stated that the act of state doctrine would not bar the court "from adjudicating this dispute," even though it might entail an inquiry into the Nigerian Government's motivations in awarding the contract (Pet. App. A36). He cautioned, however, that "inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations." He therefore urged the district court "to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial." *Ibid.*[4]

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[4] Counsel for respondent communicated with the Nigerian Embassy in Washington, requesting a declaration "that the prosecution of this civil action in the American Federal Courts will not have any impact whatsoever on the relations between the Republic of Nigeria and the United States of America" (Pet. App. A45). The Nigerian Government did not respond to that letter; nor, apparently, has it repudiated the contract or taken any other action in response to the allegations (*id.* at A45, A62 n.14).

b. After receiving the Legal Adviser's letter, the district court dismissed respondent's suit (Pet. App. A38-A73), holding that it is barred by the act of state doctrine (*id.* at A53-A66). In the court's view, the act of state doctrine applies whenever a suit would require judicial investigation of the acts of a foreign government or might interfere with the conduct of foreign policy by the Executive Branch (*id.* at A53-A55, A58). It found both of those defects here.

First, the court noted that in order to prevail, respondent must demonstrate that petitioners "intended to wrongfully influence the decision to award the Nigerian Contract by payment of a bribe, that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian Contract to Kirkpatrick, that the bribe was actually received or anticipated and that 'but for' the payment or anticipation of the payment of the bribe, [respondent] would have been awarded the Nigerian Contract" (Pet. App. A55-A56). Because "an indispensable ingredient of [respondent's] cause of action requires establishing the involvement of the Government of Nigeria, its officials or representatives in corrupt activities which violate Nigerian law," the court believed it would "question[]," either "directly or collaterally," the acts of a foreign sovereign (*id.* at A57-A58; *see also id.* at A60, A64-A65). Second, the court believed such an inquiry might embarrass the political branches, or at least make the conduct of the United States' relations with Nigeria more difficult, by inquiring into and impugning the integrity of decisions of Nigerian officials (*id.* at A55, A56, A58, A60, A64-A65).

The court also rejected respondent's contentions that it could properly "inquire as to the motivation, rather than the validity, of the questioned activities" (Pet. App. A-58-A59) and that the prosecutions of Carpenter and Kirkpatrick under the FCPA established an exception to the act of state doctrine in the circumstances of this case (*id.* at A61-A62). On the latter point, the court found it significant that the offer of proof in the FCPA case was

carefully worded and did not establish that bribes had actually been paid to Nigerian officials (*id.* at A62).

Finally, the court held that the Legal Adviser's letter did not bring this case within the "*Bernstein* exception" to the act of state doctrine, which may be invoked where the Executive Branch represents that application of the doctrine would not advance the interests of United States foreign policy (Pet. App. A62-A65).[5] The court reasoned that although the Legal Adviser took the position that the act of state doctrine is inapplicable in this case, he acknowledged that "inquiries into the motivation and validity of actions by foreign states * * * may seriously affect United States foreign relations" (*id.* at A63). The court rejected the Legal Adviser's suggestion that it should entertain the suit but "conduct the litigation with an eye to foreign policy concerns," because, in its view, that approach would violate the primacy of the Executive Branch in foreign affairs (*id.* at A63-A64).

3. a. The court of appeals reversed (Pet. App. A1-A37). It acknowledged that the award of a military procurement contract can be a sufficiently formal expression of sovereign interests to trigger the act of state doctrine and that such an award does not fall within any exception for ministerial or "commercial" acts, since it may involve national security considerations that "are far from routine" (*id.* at A12-A13). But the court held the act of state doctrine inapplicable for other reasons (*id.* at A13-A21). In its view, "the district court's dismissal

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[5] See *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). In *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), three Justices took the position that "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts" (*id.* at 768) (opinion of Rehnquist, J.)). Justice Powell, in his concurring opinion (*id.* at 773), and Justice Brennan, in his dissenting opinion for four Justices (*id.* at 776-777, 782-793), rejected the recognition of a "*Bernstein* exception." See also *id.* at 773 (Douglas, J., concurring).

was based on little more than speculation about the effect that [respondent's] lawsuit might have on relations between the United States and Nigeria," since "[t]he traditional justification for involving [*sic*] the doctrine, i.e., avoiding a judicial determination of the legal validity of a state's act within its own borders, is not present in this case" (*id.* at A17). The court noted in this regard that respondent did not seek to have the contract invalidated or to recover damages from the Nigerian Government or any of its officials, and "the district court would be called upon simply to determine as a factual matter whether [Kirkpatrick's] alleged bribery of Nigerian officials motivated the award of the contract" (*id.* at A17-A18).

The court of appeals accordingly rejected what it termed the "expansive interpretation" of the act of state doctrine by the Ninth Circuit in *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404, 407 (1983), cert. denied, 464 U.S. 1040 (1984), which held that judicial inquiry into whether bribery caused a foreign sovereign act was barred because it would "impugn or question the nobility of a foreign nation's motivation" (Pet. App. A15). In the court's view, the doctrine should not "allow litigants to shield themselves from the consequences of illegal conduct abroad" and should not "in all circumstances foreclose judicial scrutiny of the motivations behind the military procurement decisions of a foreign government" (*id.* at A16). The court found support for this view in the Legal Adviser's letter, finding that "the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will not be compromised by orderly federal court adjudication of [respondent's] lawsuit" (*id.* at A19).[6]

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[6] The court read the Legal Adviser's suggestion that the district court exercise "caution and due regard for foreign sensibilities" as a "reminder" that "[f]oreign governments have often expressed their dissatisfaction with the wide discovery authorized under the Federal Rules" and that courts should "exercise appropriate supervision over discovery and other trial preparation to limit damage to foreign sensibilities" (Pet. App. A19-A20 n.11).

b. The court of appeals also held that respondent had alleged a "pattern of racketeering activity" within the meaning of the RICO statute and the parallel state anti-racketeering statute (Pet. App. A22-A24). It concluded that "allegations of illegal conduct that constitute a single, completed criminal episode are in some circumstances sufficient to describe a pattern of racketeering activity," depending upon such factors as "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity" (*id.* at A22).

DISCUSSION

The decision of the court of appeals in this case squarely conflicts with the Ninth Circuit's holding in *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404 (1983), cert. denied, 464 U.S. 1040 (1984), that the act of state doctrine bars judicial inquiry into whether a foreign sovereign act was motivated by a bribe. Questions concerning the extent (if any) to which the act of state doctrine bars United States courts from ascertaining the motivation for the official acts of foreign governments are important and recurring. We also believe that the lower courts would benefit from guidance by this Court about the contours and bases of the act of state doctrine, in light of the splintered decisions in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), and *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682 (1976), and the passage of 13 years since the latter ruling. Review by this Court is therefore warranted.

We have twice before urged the Court to grant certiorari to consider application of the act of state doctrine in cases involving an inquiry into the motivations behind a foreign sovereign act, but the Court denied review in both cases. *Mitsui & Co.* v. *Industrial Investment Development Corp.*, 445 U.S. 903 (1980); *Hunt* v. *Mobil Oil Corp.*, 434 U.S. 984 (1977). Earlier this Term, the Court again denied certiorari in a case in which the

petitioner sought to raise these issues. *O.N.E. Shipping, Ltd.* v. *Flota Mercante Grancolombiana, S.A.*, 109 S. Ct. 303 (1988). In that case, however, we urged the Court to deny review primarily because the factual and legal context of the case was murky and because it was unclear whether, or to what extent, a judicial inquiry into the motivations of foreign officials would actually be required.[7]

This case presents no such difficulties: the allegations in the complaint are straightforward; they clearly present the act of state issue; and they do so in a not atypical factual context (alleged bribery) that fully and starkly illuminates a number of the competing considerations. This case therefore presents an appropriate occasion for the Court to revisit the act of state doctrine.

We took the position in our briefs in *Mitsui*, *Hunt* and *O.N.E. Shipping* that the act of state doctrine does not ordinarily bar judicial inquiry into the motivation, as such, for a foreign sovereign act; the Legal Adviser reiterated that position in his letter to the district court in this case. That continues to be our view as a general matter. Nevertheless, in connection with the instant case, the Department of Justice and the Department of State have undertaken a review of a number of aspects of the act of state doctrine. That review is not complete. Accordingly, at this stage of the case, we shall limit ourselves to a discussion of the background of the issues raised and some of the factors that may have a bearing on the Court's (and the parties') consideration of those issues. If the Court grants the petition, we will file a brief at the merits stage setting forth the concluded view of the United States.

Petitioners also seek review of the court of appeals' holding that respondent sufficiently alleged a "pattern of racketeering activity" within the meaning of the RICO statute. The meaning of that statutory requirement is before the Court in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, No. 87-1252, in which oral argument was held

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[7] We have furnished counsel for the parties with copies of our brief in *O.N.E. Shipping*.

on November 8, 1988. There is, accordingly, no reason for the Court to grant plenary review on that question here.[8] Instead we suggest that the Court hold the petition with respect to Question 2 until it finally disposes of Question 1, and that it then dispose of the petition as to Question 2 as appropriate in light of *H.J. Inc.* The act of state issues will not be mooted even if the Court's decision in *H.J. Inc.* should require that respondent's RICO and state-law racketeering claims be dismissed, because the act of state issues are also raised by respondent's claim under Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c).[9]

1. The "classic" formulation of the act of state doctrine is set forth in *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Put another way, the doctrine "precludes the courts of this country from inquiring into the validity of the public acts [of] a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). See also *Alfred*

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[8] We take the position in *H.J. Inc.* that a "pattern of racketeering activity" does not require multiple separate schemes, and that a pattern is present if the defendant's acts are not isolated or sporadic. We have furnished the parties in this case with a copy of our brief in *H.J. Inc.*

[9] Petitioners do not challenge the court of appeals' holding (Pet. App. A29-A30) that respondent has stated an actionable violation of Section 2(c) of the Robinson-Patman Act. See also *Grace* v. *E.J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976); *Rangen* v. *Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966) (cited in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972)).

Dunhill, 425 U.S. at 706 (opinion of White, J.). The act of state doctrine thus respects principles of sovereignty and international comity and, where applicable, operates as a choice-of-law principle supplying the appropriate rule of decision in cases in which the validity of the act of a foreign sovereign is questioned in United States courts. See *Sabbatino*, 376 U.S. at 418; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303-304 (1918); *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 309 (1918). More recently, the doctrine has been thought to derive as well from the separation of powers under the Constitution, reflecting a "policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch * * * in the conduct of foreign relations," and "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Alfred Dunhill*, 425 U.S. at 697 (opinion of White, J.); *Sabbatino*, 376 U.S. at 427-428, 431-433.

As is evident from these pronouncements, the act of state doctrine has rather limited contours. It does not ordinarily require dismissal of a suit merely because the litigation touches upon foreign relations concerns.[10] In fact, the doctrine is a rather narrow exception to the general duty of courts to adjudicate cases otherwise properly before them. See *Sharon* v. *Time*, 599 F. Supp. 538, 553 (S.D.N.Y. 1984); Restatement (Third) of Foreign Relations Law § 443 (1987). Despite the seemingly absolute nature of the doctrine as formulated in *Underhill*, this Court has declined to lay down an "inflexible and all-encompassing" rule (*Sabbatino*, 376 U.S. at 428; accord *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355, 1360-1361 (9th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1933 (1989)), and in *First National City Bank*

[10] For example, in *Sabbatino* itself, the act of state doctrine did not require dismissal of the suit, but only that the expropriation of property in that case be given effect as the rule of decision. See 376 U.S. at 428-437.

and *Alfred Dunhill*, it permitted judicial inquiry into the validity of the act of a foreign sovereign where that result was consistent with related legal principles or the underlying purposes of the doctrine. On the other hand, because it is based on the "competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations" (*Sabbatino*, 376 U.S. at 423), the act of state doctrine, where it applies, requires judicial abstention, despite the resulting hardship upon individual litigants whose otherwise potentially meritorious claims cannot be adjudicated in United States courts.

2. a. The lower courts have been divided over the application of the act of state doctrine in cases that may involve a judicial inquiry into the motivation of a foreign state and its agents. The courts have found such an inquiry to be barred in some cases. *Clayco, supra; Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977); *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir. 1972). In others, including the decision below, such an inquiry has been permitted. *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983), cert. denied, 464 U.S. 849 (1983); *Williams* v. *Curtiss-Wright Corp.*, 694 F.2d 300 (3d Cir. 1982); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Industrial Investment Development Corp.* v. *Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980); *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). See also Restatement (Third) of Foreign Relations Law § 443, reporter's note 7, at 379-80 (1987).

We recognize that the results in some of the cases might be reconciled—*e.g.*, on the ground that inquiry has been barred where the act of the foreign sovereign was itself the direct or immediate cause of the injury, rather than merely part of the context in which essentially private conduct caused the injury (see *Clayco*, 712 F.2d at 407 (distinguishing *Mitsui* on this basis)), or

that the nature of the inquiry into motivation was such that it necessarily would implicate validity (see *Hunt*, 550 F.2d at 77). Even so, the lower courts remain uncertain and varied in their analytical approaches to deciding whether "motivation" is a proper subject of inquiry.

To some extent, the divergence in approach may reflect differing views of the underpinnings and primary focus of the act of state doctrine. For example, if a court emphasizes the choice-of-law aspects of the doctrine,[11] it may be disposed to consider only whether the act of the foreign state will either be given effect or held invalid as a formal matter, and to regard a judicial inquiry into the reasons *why* the foreign government took the actions it did (*e.g.*, because of corruption or pressure exerted by private parties, rather than because of distinctly governmental or sovereign interests) as largely beyond the concern of the act of state doctrine. On the other hand, if a court emphasizes the separation-of-powers aspects of the doctrine, it may be disposed to ask whether the Executive Branch's conduct of the Nation's foreign relations would be embarrassed by adjudication of the particular case, and thus to be concerned about whether a foreign government would be offended by litigation in United States courts that might expose its decision-making to scrutiny or impugn its integrity.

b. The tension between these two visions of the act of state doctrine is exacerbated in the present context by the uncertain relationship among this Court's decisions in *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927); and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In *American Banana*, the Court, in an opinion by Justice Holmes, affirmed the dismissal of a private antitrust suit alleging that the defendant had caused the government of Costa Rica to seize the plaintiff's property (a banana planta-

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[11] See, *e.g.*, Leigh & Sandler, Dunhill: *Toward a Reconsideration* of Sabbatino, 16 Va. J. Int'l L. 685, 709-718 (1976).

tion) for the purpose of eliminating it as a competitor. The Court first held that the antitrust laws did not reach conduct occurring outside the United States (213 U.S. at 357), a holding that has been rejected by subsequent decisions. See *Continental Ore*, 370 U.S. at 704-705. However, the Court also relied on act of state principles (213 U.S. at 357-359):

> The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be complained of elsewhere in the courts. *Underhill* v. *Hernandez*, 168 U.S. 250.
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> * * * * *
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> The fundamental reason why persuading a sovereign power to do this or that cannot be a tort * * * is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.
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> * * * As to the buying at a high price, etc., it is enough to say that we have no ground for supposing that it was unlawful in the countries where the purchases were made. * * * A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.

Sisal Sales was an injunctive action alleging that the defendants had conspired in the United States to monopolize and restrain trade in sisal by, *inter alia*, securing passage of favorable legislation by the Government of Mexico. In holding that the complaint stated a valid claim for relief, the Court distinguished *American Ba-*

nana as involving "acts done outside the United States and not unlawful by the law of the place" (274 U.S. at 276). By contrast, in *Sisal Sales*, "[t]he United States complain[ed] of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties" (*ibid.*). Although "the conspirators were aided by discriminating legislation," they were "within the jurisdiction of our courts and [could] be punished for offenses against our laws" (*ibid.*).

Finally, in *Continental Ore*, the defendants had conspired in the United States to establish an exclusionary customer-allocation program for sales of vanadium in Canada by utilizing the authority of a wholly owned subsidiary of one of the defendants as the exclusive purchasing agent for the Canadian government. In upholding the claim, this Court analogized the case to *Sisal*, again distinguishing *American Banana* (370 U.S. at 705 & n.13), and continued (*id.* at 706):

> In the present case [plaintiffs] do not question the validity of any action taken by the Canadian Government or by its Metals Controller. * * * As in *Sisal*, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.

This Court has never clarified the extent to which the holding of *American Banana* survives *Sisal Sales* and *Continental Ore*, although in *Sabbatino* the Court referred to *American Banana* as one of several decisions "directly or peripherally" involving the act of state doctrine that did not "manifest any retreat from *Underhill*" (376 U.S. at 416).[12] It is unclear, for example, to what

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[12] The lower courts have generally concluded that the holding of *American Banana* has survived *Sisal* and *Continental Ore*, although they have sometimes distinguished *American Banana* and found the act of state doctrine inapplicable in the particular case. Compare *Mitsui*, 594 F.2d at 52-54 (doctrine inapplicable), with *Hunt*, 550

extent *American Banana* should now be viewed as turning primarily on the supposed inapplicability of the antitrust laws to actions occurring outside the United States, the apparent absence of unlawful conduct within the jurisdiction of the United States, and the fact that the expropriation was the immediate cause of the injury to the plaintiff. The mix of these factors was obviously different from those in *Sisal Sales* and *Continental Ore*, where an act of a foreign government was not so central to the unlawful scheme and was not so directly the cause of the injury to the plaintiff, and where there was less reason to suppose that the foreign government had effectively ratified the defendants' conduct.

3. In response to the Court's invitation in the *Hunt* and *Mitsui* cases, the United States expressed the view—which is quoted at pages 3-4, *supra*, and in the Legal Adviser's letter to the district court (Pet. App. A34-A35)—that the act of state doctrine does not ordinarily bar inquiry into the reasons why a foreign government took the action in question. Although we have not reached a concluded view on the point in the circumstances of this case, that continues to be our view as a general matter at this time, at least where the Executive Branch believes that the adjudication would be consistent with the foreign relations interests of the United States. See *First National City Bank*, 406 U.S. at 768 (opinion of Rehnquist, J.). It is useful to bear in mind, however, the somewhat different factual and legal contexts in which the issue may arise.

Cases in which the motives of a foreign government or its agents are implicated have involved the revocation of a license under local law (*Mitsui* and *Mannington Mills*); military contract procurement decisions (*Northrop Corp.* and *Williams*); the expropriation of property or seizure of territory (*Hunt* and *Buttes Gas & Oil*); and the institution of judicial proceedings (*Timberlane Lumber*).

F.2d at 73-75 (doctrine applicable), and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. at 109-110 (same).

Further, the relationship of the question of "motivation" to the issues presented has varied considerably, depending upon the nature of the claims and defenses, the source and content of the applicable law, and the underlying facts. Such a wide array of factual and legal contexts may counsel against a single, inflexible rule as to when (if ever) inquiry into the cause of a foreign government's acts should be barred by the act of state doctrine.

For example, it seems clear that in *Mitsui*, the act of state doctrine properly did not bar adjudication of the plaintiff's claim that private defendants conspired to monopolize the lumber export industry in Indonesia by causing plaintiff's joint venture to fail under local law, which resulted in the automatic revocation of a previously issued license under that same law, neutrally applied. To resolve the liability issues, the court was not required to inquire into the validity of the foreign sovereign's act, or even to resolve any questions concerning the motivation of the officials who revoked the license (see 594 F.2d at 53-55), and there was no reason why an official act of a foreign government should have insulated the defendants from liability that was the immediate and foreseeable consequence of their unlawful conduct. As in *Continental Ore*, the involvement by agents of the foreign government was little more than the context in which the unlawful conduct occurred. By contrast, in *Hunt*, the legality of the challenged expropriation as a matter of international law would have turned in part on whether it was an act of political retaliation and economic coercion. A judicial inquiry into the purposes of the expropriation therefore would necessarily have implicated its validity as a matter of international law. See 550 F.2d at 77.

4. For the foregoing reasons, the application of the act of state doctrine presents difficult questions when the conduct of the foreign state or its agents combines with the conduct of private parties to injure the plaintiff. In that context, the act of state doctrine, as a narrow exception to a court's general "duty to adjudicate" (*Sharon*

v. *Time*, 599 F. Supp. at 553), must be applied with circumspection, so as not lightly to deprive individual litigants of their "day in court."

In the present case, the court of appeals rejected what it regarded as the "expansive interpretation" of the act of state doctrine in *Clayco*, which held that judicial inquiry into whether a foreign sovereign act resulted from a bribe was barred because it would " 'impugn or question the nobility of a foreign nation's motivation' " (Pet. App. A15; see 712 F.2d at 407). The court below then concluded, with little supporting analysis, that the act of state doctrine should not bar further proceedings in this case because "adjudicating [respondent's] claims before the court would have required at most an inquiry only into the motivations behind, rather than the legality of, the foreign government's acts." Pet. App. A21.[13] However, even if the court below properly concluded that a judicial reluctance to impugn the integrity of a foreign government's decision-making does not alone trigger the act of state doctrine, it would not necessarily follow that the doctrine is altogether inapplicable in the circumstances of this case. The court below was of course correct that a decision in favor of respondent would not require the district court formally to declare the Nigerian contract invalid as a matter of Nigerian law. But as the district court pointed out (Pet. App. A55-A56), a necessary element of respondent's case is proof that the payment or promise of a bribe was the "but for" cause of the con-

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[13] In the circumstances of this case, there is considerable force to the conclusion by both courts below that the decision to award a military procurement contract—a decision that is often "influenced by national security considerations"—is a sufficiently "official" expression of a state's "public" interests to warrant application of the act of state doctrine. Pet. App. A12-A13, A57. See *Williams* v. *Curtiss-Wright*, 694 F.2d at 302; *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d at 1048. Compare *Remington Rand Corp.-Delaware* v. *Business Systems, Inc.*, 830 F.2d 1260, 1265 (3d Cir. 1987) (act of foreign bankruptcy trustee not act of state); *Maunlington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1294 (3d Cir. 1979) (issuance of foreign patent not act of state).

tract award,[14] and such proof may in turn have some bearing on the validity of the contract.

As the parties and the courts below noted, Nigeria, like most nations, makes bribery of a public official in return for performance of an official act illegal. See Decree No. 38, §§ 1-3 (Nov. 22, 1975) *reprinted in* 62 Federal Republic of Nigeria Official Gazette, No. 59 (Dec. 2, 1975).[15] See also H.H. Marshall, *The Laws of Northern Nigeria*, cap. 89, ch. X, §§ 115-122 (1965); D. Kingdon, *The Laws of the Federation of Nigeria and Lagos*, Criminal Code, cap. 42, ch. XII, §§ 98-104 (1958); cf. 18 U.S.C. 201 (1982 & Supp. V 1987). Under accepted common law principles in this country, an agreement (such as that between Carpenter and Akindele) to use improper influence to procure a government benefit is illegal as contrary to public policy.[16] Furthermore, applying similar common law principles, the courts have held that the violation by a public official of a criminal statute making it illegal for him to have an interest in a government contract renders that contract void, or at least voidable at the instance of the government.[17]

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[14] See 18 U.S.C. 1964(c), 1962(b), (c), 1961(1)(A) (1982 & Supp. V 1987); cf. *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-660 (1960); see also Pet. App. A56.

[15] The Decree provides that "any gratification" received by a government employee from "a person or agent of a person who has or seeks to have any dealing with the Government" is presumed "to have been paid or given and received corruptly as an inducement or reward * * * unless the contrary is proved" (*id.* § 4).

[16] *Crocker* v. *United States*, 240 U.S. 74 (1916); *Hazelton* v. *Sheckells*, 202 U.S. 71 (1906); *Oscanyan* v. *Arms Co.*, 103 U.S. 261 (1880); *Meguire* v. *Corwine*, 101 U.S. 108 (1879); *Trist* v. *Child*, 88 U.S. (21 Wall.) 441 (1874); *Tool Co.* v. *Norris*, 69 U.S. (2 Wall.) 45 (1864). See also *Montefiore* v. *Menday Motor Components Co.*, 87 L.J.K.B. 907, 909 (1918); *Waldo* v. *Martin*, 107 Eng. Rep. 1078, 1080 (1825); *Morris* v. *MacCullock*, 28 Eng. Rep. 870, 871 (1763).

[17] *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 563-566 (1961); *Pan American Petroleum & Transport Co.* v. *United States*, 273 U.S. 456, 500 (1927); *Crocker* v. *United States*, 240 U.S. at 81; *Burck* v. *Taylor*, 152 U.S. 634 (1894);

Nigerian law may also declare that a government contract obtained by bribery is invalid, at least at the option of the government.[18]

Thus, an adjudication by a United States court that a contract was awarded by a foreign government because of the payment or award of a bribe—*i.e.*, that the bribe was the "motivation" for the award—may often establish facts necessary to render the award illegal under the law of the foreign state and to render the contract itself voidable or void as a result.[19] However, it does not necessarily follow that this consequence would trigger application of the act of state doctrine or, if it did, that an exception or modification of that doctrine would be inappropriate. It may be argued, for example, that the

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Miller v. *Ammon*, 145 U.S. 421 (1892); *Bank of the United States* v. *Owens*, 27 U.S. (2 Pet.) 527 (1829). See also *City of London Electric Lighting Co.* v. *Mayor of London*, [1903] App. Cas. 434 (H.L.(E.)), aff'g [1901] 1 Ch. 602, 613 (Rigby, L.J.); *Meliss* v. *Shirley & Freemantle Local Board of Health*, 16 Q.B.D. 446, 451-452 (1885).

[18] Nigeria is a former British colony, and its law is broadly based upon English common law principles. See T. Elias, *The Nigerian Legal System* 12, 17-21, 214 (1963) ("principles governing * * * [Nigerian] cases on contract * * * are * * * broadly the same as those of English law"); see also *Sodipo* v. *Lemninkainen Oy*, [1986] 1 N.W.L.R. 220, 232 (Nigeria Sup. Ct.). Relying on English precedents, Nigerian courts have held that a contract to use improper influence to procure a government benefit (such as a government contract) is illegal as contrary to public policy. *Koko* v. *Page Communications Engineers Inc.*, [1975] N.C.L.R. 149, 156-157 (Lagos High Ct.). See also O. Achike, *Nigerian Law of Contract* 179 (1972). Similarly, Nigerian courts have held that illegality renders a contract invalid. *Sodipo* v. *Lemninkainen Oy*, [1986] 1 N.W.L.R. at 229, 232-236. See also *George* v. *Dominion Flour Mills Ltd.*, [1963] 1 All N.L.R. 71, 73-74 (Fed. Sup. Ct.).

[19] A United States court might even distinguish between a void contract and a voidable contract for these purposes. It could conclude, for example, that unless the foreign government formally repudiates the contract, it should be regarded as valid, notwithstanding an adjudication by a United States court that an officer of the foreign government awarded the contract only because he received a bribe.

fact that bribery is illegal under the law of Nigeria distinguishes this case from *American Banana*, where the efforts to obtain passage of the expropriation legislation were presumed to be lawful under the law of Costa Rica. See 213 U.S. at 357-358; see also *Sisal Sales*, 274 U.S. at 276, quoting *American Banana*, 213 U.S. at 359 (emphasis added) ("'A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, *if they are permitted by the local law.*'"). Because the general laws of the United States and Nigeria are in agreement regarding the illegality of bribes made to public officials (cf. *Sabbatino*, 376 U.S. at 428), it could be argued that proof of such a bribe as an element of a cause of action arising under the laws of the United States would not necessarily demonstrate the sort of disrespect for another sovereign that has concerned the courts in other settings.[20]

The Court might also take into account the fact that because both Nigerian citizens and United States citizens were parties to the allegedly unlawful transaction in this case, any interests of the Nigerian Government that may be safeguarded by the act of state doctrine by virtue of the performance by its officials of public acts must be weighed against the interests of the United States in reg-

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[20] In *Sabbatino*, the Court held that the Cuban expropriation decree could not be challenged on the ground that it was not issued in conformity with Cuban law. The Court concluded that the act of state doctrine bars a United States court from inquiring into the validity of an act of an official of a foreign state under the law of that state, because such an inquiry "would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question" (376 U.S. at 415 n.17). In this case, by contrast, respondent does not ask the courts below to find either the alleged payment of bribes to Nigerian officials or the award of the contract to Kirkpatrick rather than respondent unlawful as a matter of Nigerian law. Respondent contends, rather, that it was injured as a result of petitioners' violation of United States law. We suggest in the text only that a court might be permitted to adjudicate the alleged violation of United States law because the type of conduct on which the violation is premised—the bribery of public officials—is also a violation of Nigerian law.

ulating the conduct of its citizens who engage in the foreign commerce of the United States. A relevant consideration in this regard is that Congress, in the FCPA, has made it a criminal offense for a United States national to offer a bribe to a foreign official in order to obtain a contract and has authorized the Attorney General and Securities Exchange Commission to seek injunctive relief or civil penalties (15 U.S.C. 78dd-1 and 78dd-2, as amended by the Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, Tit. V, Subtit. A, Pt. I, 102 Stat. 1415)—thereby contemplating that such conduct may properly be the subject of inquiry by United States courts in some circumstances.[21] On the other hand, the judicial proceedings expressly authorized by the FCPA remain under the control of the United States Government, which preserves an opportunity for the Executive Branch to prevent any undue embarrassment to foreign relations. In the absence of additional procedures, the Executive Branch does not have the same opportunity where, as here, the litigation is instituted by private parties. See *Clayco*, 712 F.2d at 409.

5. We do not propose a definitive resolution of the foregoing issues and possible analytical approaches at this time. We merely identify them now, in anticipation of the occasion for a comprehensive consideration of the underpinnings and proper focus of the act of state doctrine in this setting if the Court grants review.

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[21] *Sage Int'l* v. *Cadillac Gage Co.*, 534 F. Supp. 896, 905 (E.D. Mich. 1981); *Dominicus Americana Bohio* v. *Gulf & Western Indus.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979); contra *Clayco*, 712 F.2d at 409. See also Note, *Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases*, 59 Notre Dame L. Rev. 455 (1984); Note, Clayco Petroleum Corp. *v.* Occidental Petroleum Corp.: *Should There Be a Bribery Exception to the Act of State Doctrine?*, 17 Cornell Int'l L. J. 407 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted, limited to Question 1. With respect to Question 2, the petition should be held and disposed of as appropriate in light of the Court's decision in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, No. 87-1252 (argued Nov. 8, 1988).

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

MICHAEL JAY SINGER
JOHN P. SCHNITKER
Attorneys

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